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BAR BULLETIN

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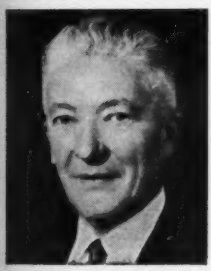
VOL. 30 JANUARY, 1955 No. 4

The President's Page

By Harold A. Black

President, Los Angeles Bar Association



Harold A. Black

It's Christmas time when this is being written. The Christmas Jinx was exceptionally good, and as usual, a capacity crowd attended. We are well aware of the hard work that went into the production, and our thanks go to the committee, authors, cast and stagehands for an excellent job.

* * *

Christmas time! A time for reuniting of families — the laughter of little children—the exchange of messages of good will between old friends who found no time to write or call during the year; a time for reaffirmation of one's faith, of whatever creed; a time for realization that the things that endure are those of the spirit.

A time also for reappraisal of our individual and collective practices and beliefs. Are we giving liberally, even lavishly to our own small circle, and giving only a pittance to or neglecting altogether the agencies that care for the homeless, the crippled and the impoverished? In our zeal to protect and preserve our country and its

cherished institutions from internal attack, are we forgetting that the right to hold an unpopular view is basic to the democratic concept, and that unorthodoxy is not treason? Are we putting too much reliance on weapons of mass destruction to arrest the Communist menace, and neglecting to demonstrate to less fortunate people that our way of life holds out a promise for bettering the lot of all mankind?

While we celebrate the birth of the Man of Nazareth, we might well pause to see whether what we do is consistent with his teachings.

The American Academy of Forensic Sciences will hold its next Annual Meeting at the Biltmore Hotel, Los Angeles, February 17-19, 1955.

It is believed that portions of the Program will be of particular interest to attorneys.

On Thursday morning and afternoon there will be general scientific sessions with papers on Forensic Pathology, Forensic Toxicology and Criminalistics.

On Friday morning the usual special Section Meetings will be held: 1) Section on Pathology; 2) Section on Toxicology; 3) Section on Psychiatry; 4) Section on Questioned Documents; and 5) Section on Criminalistics.

On Friday afternoon there will be a symposium on Alcohol and Intoxication with discussion of Tests for Intoxication, the Clinical Interpretation of Blood Alcohol Levels, the Psychiatric and Psychologic Aspects of Intoxication, the Legal Aspects of Intoxication and the Ethical Principles related to certain phases of the Problem.

On Saturday morning a symposium has been arranged in two parts: 1) Scientific Investigation of Suspect Deaths (with the viewpoints of the pathologist, the toxicologist, and the criminalistic laboratory expert). 2) The Use of Scientific Evidence (with the viewpoints of the prosecuting attorney, the defense attorney and the Court).

All sessions are open to members of the Los Angeles Bar Association. It is, however, urgently requested that all who wish to attend, pre-register by telephone or letter to Frederick D. Newbarr, M.D., 109 Hall of Justice (Coroner's Office), Los Angeles 12.

About Federal Rule of Civil Procedure No. 43(b)

By Ernest L. Heimann*

Ernest L. Heimann

(1) Who may be called under Rule 43(b)

Before the Federal Rules of Civil Procedure went into effect, the states' rules applied in the federal courts under the Conformity and Rules of Decisions Acts[1] both as to who qualified as an adverse witness and as to the consequences of such qualification, except in equity and admiralty cases to which these acts were not applicable and in which the federal courts made their own rules.[2]

Rule 43(a) makes admissible "all evidence . . . which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied

*Member California and Arizona Bars; Attorney, National Labor Relations Board, Los Angeles.

[1]Conformity Act (U.S. Rev. St. 1878, Sec. 815, 28 U.S.C.A. Sec. 724; derived from an 1872 law): "The practice, pleading and form and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, any rule of court to the contrary notwithstanding."

Rules of Decisions Act (going back to Judiciary Act of 1789, U.S. Rev. St. 1878, Sec. 721; 28 U.S.C.A. Sec. 725): "The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

There was also in effect a Competency of Witnesses Act (R.S. 858; 34 Stat. 618 (1906); 28 U.S.C.A. Sec. 631) which read: "The competency of a witness to testify in a civil action, suit or proceeding in the courts of the United States shall be determined by the law of the state or territory in which the court is held."

[2]Davidson Steamship Company v. U.S., 142 Fed. 315 (C.C.A. 8, 1905), affirmed 205 U.S. 187, 27 Sup. Ct. 480, 51 L. Ed. 764. Holding: Under Minnesota statute (allowing adverse party, or its directors, officers, superintendent or managing agent to be called as adverse witness) master of corporation's ship, with authority to control and direct its movements, may be called as adverse witness.

P. F. Collier and Son Co. v. Hartfeil, 72 Fed. 2d 625 (C.C.A. 8, 1934). Holding: In action against driver and his employer for accident, cross-examination of driver on issue of his employment was improper, since driver was not adverse party to plaintiff *on that issue*. The state statute was cited.

Pennsylvania Railroad Company v. Allegheny Valley Railway Company, 25 Fed. 115 (C.C. Pa., 1885); Dravo v. Fabel, 25 Fed. 116 (D.C. Pa., 1885), affirmed 132 U.S. 487, 10 Sup. Ct. 170, 33 L. Ed. 421; Calviada Colonization Co. v. Hays, 119 Fed. 202 (C.C. Pa., 1902). Holding of these cases: Pennsylvania statute, providing that adverse party may be examined as if under cross-examination, is not applicable to a suit in equity in federal court, since Rules of Decisions Act does not apply to suits in equity.

in the courts of general jurisdiction of the state in which the United States court is held." What evidence is admissible under U.S. statutes or under the rules of the states in which the U.S. court sits is generally clearer than what evidence was admissible in equity matters in the U.S. courts prior to the adoption of the F.R.C.P. The old Equity Rule 46 was the predecessor of the new Federal Rule 43(a), but it was in no way determinative of what evidence was admissible.[3] Furthermore, the case law of the federal equity courts affords no sure guide as to the rules of evidence applied by these courts. Although the Conformity and the Rules of Decisions

[3]The old Equity Rule No. 46 read as follows: "In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objections made, the ruling, and the exception. If the Appellate Court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require." Equity Rule 47 allowed depositions to be taken in exceptional instances.

These rules were adopted by the United States Supreme Court on November 4, 1912, to be enforced on and after February 1, 1913. They replaced equity rules which had been in effect from 1866 to 1911. Rule 67 of 1866, which was replaced by Rule 46 of 1912, provided for the taking of testimony by interrogatories, and only upon request of a party for the oral taking of testimony.

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Issue Editor—C. C. Clad

Acts were not applicable in equity proceedings, the federal equity courts generally applied the same evidence rules as the federal law courts, i.e. they followed state rules, except that equity courts were more prone than law courts to brush lightly over points of evidence. Thus, in practice, federal courts may apply today the evidence rule contained in a federal statute or the state rule, whichever is the more liberal, or they may follow the old equity courts in brushing lightly over highly technical or antiquated evidence rules thus "applying reforms to individual rules [and] keeping them abreast of the times."[4]

Contrary to Rule 43(a), Rule 43(b) makes no reference to state rules. It provides (1) that a party may interrogate any unwilling or hostile witness by leading questions, and (2) that a party may call an adverse party or an officer, director, or managing agent of a corporation or of a partnership or unincorporated association which is an adverse party and interrogate such party, officer, director, or managing agent by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party.

It may thus be seen that Rule 43(b) deals with two categories of witnesses: first, unwilling or hostile witnesses, and second, adverse parties, or officers, directors, or managing agents of incorporated or unincorporated associations which are adverse parties.

I shall deal with the second category of witnesses first, and I shall call that category of witnesses "adverse witnesses" to distinguish them from merely "hostile or unwilling witnesses."

What persons fall into the categories enumerated in that part of Rule 43(b)? There hardly ever is any difficulty in deciding who is the adverse party if the adverse party consists of one or more natural persons: it usually is either the individual named as respondent or the members of a respondent partnership. Generally, it is also clear who is an officer or director of the adverse party, since this is set out by the articles of incorporation, if the adverse party is a corporation, or by the union constitution, if the adverse party is a labor organization.

The question who is a managing agent in the meaning of Rule 43(b) involves much greater difficulty. That question has usually been considered in connection with Rule 4(d) which requires, as one of the methods of service, service on the managing agent of a

[4] "Evidence and the new Federal Rules of Civil Procedure," by C. C. Callahan and E. E. Ferguson, 47 Yale L. J. 194 (December 1937).

corporation or partnership or unincorporated association. However, Rule 4(d) also allows such service as is sufficient under the statute of the state in which the respective federal court sits. Thus, if the statute of that state also provides for service upon "managing agents," state cases construing that term are obviously applicable authority. Although Rule 43(b), contrary to Rule 4(d), contains no reference to state practice, it would undoubtedly nevertheless be proper for trial examiners and courts to be guided in the interpretation of the term "managing agent" contained in that rule by state court interpretations and by federal cases adopting state court interpretations of that term. This view is shared by Moore who says in his work on Federal Practice that "the court must approach the question pragmatically, somewhat in analogy to its approach to the determination of who is a 'managing agent' for the purpose of receiving service as provided in Rule 4(d) (3)."[5]

There are, of course, innumerable state cases defining that term. Most of the federal cases dealing with that subject apply the term to the particular person and situation involved in the particular case;[6] but there are also some federal cases which attempt, usually on the basis of prior state cases, to lay down a general rule to the effect that a managing agent is a person "to whom the corporate owner [or other association] has committed the general management or superintendence of the whole or a particular part of its business"[7] or a person "invested by the corporation [or other association] with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney who acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of his duty and the manner of executing it."[8] In essence therefore a managing agent is what the comman law regards as a general agent as distinguished from a special agent, if I understand the common law on that subject correctly.

It is notable that in one of the few cases which I have found construing the term "managing agent" under Rule 43(b)[9] the court

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[5]Moore, *Federal Practice*, Vol. 2, Sec. 26.18, p. 2490.

[6]A list of these cases is attached as Appendix.

[7]*The Marguerite W.*, 49 Fed. Supp. 929 (D.C. Wis.).

[8]Cohen v. American Window Glass Co., 41 Fed. Supp. 48 (D.C. N.Y.).

[9]Moran v. Pittsburgh-Des Moines Steel Co., 183 Fed. 2d 467 (C.A. 3). Court's finding was based on fact that witness, with acquiescence of defendant-partnership, had signed letters with partnership's letterhead as manager of partnership's engineering and purchasing departments.

recognized apparent or ostensible agency as sufficient to make a person a "managing agent" in the meaning of that rule.

As mentioned previously, Rule 4(d) allows not only such service as is specifically provided for therein but also such service as is sufficient under the statute of the state in which the respective court sits. Thus, if the state statute should make service upon an "employee" sufficient, such service would also satisfy Rule 4(d). However, Rule 43(b) provides that only certain persons *named therein* can be called as adverse witnesses; it does not provide that persons who can be called as adverse witnesses under state statutes[10] can be called as such in federal courts, and no court has so held, at least not expressly. Technically, interpretations of the term "managing agent" as used in state statutes are not even controlling in the determination of what that term means in Rule 43(b), although it is certainly reasonable to consider such interpretations. But it does not follow that other categories of agents or employees, callable as adverse witnesses under state statutes but not listed in Rule 43(b), can be called as adverse witnesses in federal courts or agencies.

Nevertheless, there are some cases in which the federal courts refer to state statutes or state cases in determining whether a witness may be called as adverse or hostile witness. However, these

(Continued on page 123)

[10]The California statute, for instance, allows the calling of mere employees of the adverse party as adverse witnesses. See California Code of Civil Procedure, Sec. 2055 as amended.

Appreciation of the Los Angeles Bar Association is extended to the members of the Federal Courts Criminal Indigent Defense Committee who are contributing their services and time on behalf of the Association and the Bar in general. Those who volunteered to serve during the month of November, 1954, are as follows:

MORRIS L. MARCUS (Served in Nov.)
OWEN J. BRADY
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FRANK CHUMAN
ROBERT EINSTEIN
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Frequently Recurring Title Problems

By James F. Healey, Jr.*

EDITOR'S NOTE: *From the wealth of his experience, Mr. Healey has collected the most common problems which confront lawyers in this field. They are presented in alphabetical order, for easy reference.*

The first installment is presented here. The balance of his suggestions will follow in subsequent issues.

ACKNOWLEDGMENTS

When one encounters in the chain of title an instrument which bears a defective acknowledgment (or no certificate of acknowledgment at all), it is advisable to bear in mind C.C. 1207, which provides that such defect or omission is "cured," when such instrument has been of record for one year.

ATTACHMENTS

When an attachment has been filed and a judgment has been obtained against a person under one name (*e. g.*, Fred Jones) and the debtor owns real property under a different name (*e. g.*, Frank Jones) or the debtor places title in the name of a spouse, relative or friend, the writ of execution should be levied both ways (*i. e.*, on all right, title and interest of Fred Jones, standing of record in the name of Frank Jones). If this information as to how title is held is known prior to attachment, the attachment should be made to read accordingly.

COMMUNITY PROPERTY

Sometimes, for tax reasons, it appears advisable to convert tenure of title from joint tenancy to community holding, or to a tenancy in common. Since C.C. 164 provides that real property acquired by a husband and wife by instrument describing them as such is only *presumed* to be community property, it appears advisable to expressly state in such deed "as their community property." Where spouses acquire as (or subsequently convert to) tenants in common, it is often presumed by the attorney and the parties that each now owns and may deal with one-half of the property. Since there is no presumption in the law that the interests

*Associate Counsel, Title Insurance and Trust Co., Los Angeles.

of tenants in common are necessarily equal, it seems advisable to spell out their respective interests, in the deed.

CONTRACTS OF SALE

Many subdividers and real estate operators use the Contract of Sale method of selling real property, where the down payment is too small to warrant giving a deed and taking back a large purchase money deed of trust. In order not to have the contract appear of record (and thereby take a chance that the purchaser may default and disappear and make a quiet title action necessary, to clear the record) the contracts frequently are not acknowledged and hence not entitled to be recorded. C.C. 1238 provides that a person may homestead any freehold title, interest or estate which vests in the claimant the immediate right of possession, even though such a right of possession is not exclusive. Hence, it is apparent that the vendee under an unrecorded Contract of Sale has a perfect right to declare a homestead (and thereby make his interest a matter of record).

From the point of view of a vendee under such a contract (whether recorded or unrecorded) there is always the spectre of the inability of the vendor to complete the transaction and give a deed, due to the subsequent intervention of bankruptcy, death, incompetency of various degrees, or insanity. Even a corporate vendor may suffer such problems as bankruptcy or dissolution.

COVENANTS, CONDITIONS and RESTRICTIONS

For the sake of convenience and to materially reduce recording costs, it has become customary, in setting up new tract subdivisions, to record a "master" Declaration of Restrictions and then to incorporate it by reference in all conveyances. It is very important that each deed expressly incorporate the Declaration by reference, for the reason that the Declaration is itself no more than a statement of what the tract owner intends to do. It is not of itself sufficient to impose the restrictions. See *Mapel v. Canady*, 189 Cal. 373.

Most of the newer tract subdivisions are made subject to a "general plan" of restrictions, in order that each owner may have the right to enforce them as against each other owner. It is imperative that the conveyances so recite. It is not enough that the tract owner so intends, or that the restrictions just happen to be uniform. If you desire to impose a general plan of restrictions, you must expressly say so, says *Werner v. Graham*, 181 Cal. 174.

DESCRIPTIONS

(1) *Street Address:* It appears that street addresses are being used with alarming frequency to describe property, rather than the use of a legal description. This seems to be particularly true in probate and divorce proceedings. There can be no doubt that a street address is a sufficient description to enable a court or a person to locate or to identify a parcel of real property, but the use of such an appellation often gives rise to the question: "What property?" Suppose that a judgment awards or distributes property by a street address. The public records reflect ownership by legal description; who will "convert" the address to a legal description? The Title Company keeps up to date atlases and street address books where the same are available, but with the rapid growth of our county, the tremendous volume of new tract subdivisions and such other factors as changes of street names and re-numbering of entire sections, it is impossible to obtain accurate and up-to-date atlases. It is, of course, always possible to obtain such "conversion data" from the appropriate City Engineer's office records, but most of the City Engineers decline to impart such information over the telephone (due to the question of their liability for imparting incorrect information). Hence, a personal visit to the office of the appropriate City Engineer's Office appears to be called for. Why all this concern, you inquire? Let us exemplify: Assume that title to Blackacre is vested in John Doe and Jane Doe, husband and wife, and that a divorce decree awards to Jane Doe the premises located at 1234 Oak Street. When she desires to sell or to negotiate a loan upon the property, the title company will be asked to issue an evidence of the title upon Blackacre. Are the two descriptions synonymous? Is there just one house on the lot? Is it a single-family residence, a duplex or a double? Are the improvements located entirely on one lot, or are they located partly on one lot and partly on another? It is obvious that the street address is the measure of the award made by the court, but the problem is to fit the award to the actual ground conditions. Moreover, to attempt to later have the judgment amended (to substitute the true legal description for the street address) poses a problem. In at least one case of which the writer has actual knowledge, the court declined to amend the judgment *nunc pro tunc,* for the reason that its power to so amend is limited to correcting "clerical errors," as provided in C.C.P. 473.

(To be continued)

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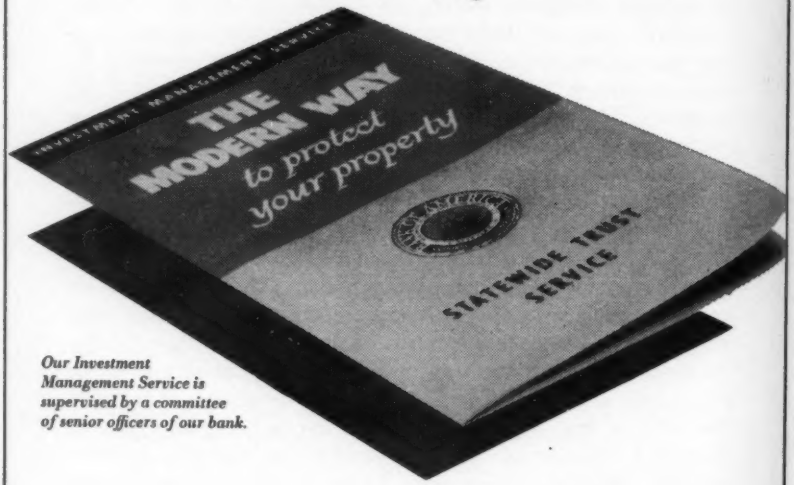

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Brothers-In-Law

By George Harnagel, Jr.

George Harnagel, Jr.

"The advocate is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law—he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other license which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer." — In R. v. O'Connell (1844), 7 Ir.L.R. 261 at p. 313.

* * *

The Bar Association of the **District of Columbia** several months ago sponsored a cruise to Bermuda, and already demand is growing for another one.

* * *

"It has in recent years become increasingly evident that the traditional theory on which tort responsibility rests bears little resemblance to the realistic basis on which awards are made. In a socially conscious world which keynotes Security, the emphasis is on ascertaining 'Who needs it economically' rather than 'Who is entitled to it legally.' If our trials absorb a great deal of time on issues of liability, it is because the participants in the judicial process hate to admit that new concepts have outmoded traditional formulae. We should be frank enough to admit that despite all objective evidence to the contrary, the atmosphere of the court room is supercharged with the philosophy that proclaims that the bill must be paid, not by those who are to blame for the damage, but by those who can carry the financial burden. I claim no credit for this discovery—I am merely repeating what Holmes, Cardozo, Pound, and other jurists and scholars have repeated on countless occa-

sions."—Chief Justice Elijah Adlow of the Municipal Court of the City of Boston.

* * *

We are reliably informed that shortly before April 1 last, the following notice was posted by Louis A. Toepfer, Assistant Dean of the Harvard Law School:

NOTICE OF OPPORTUNITY — THIRD YEAR STUDENTS

The Placement Office has heard of an excellent opportunity with the firm of Fair & Warmer, in Miami, Florida. This is an office that specializes in handling the affairs of various exclusive resorts, including those located in the Virgin Islands, the Bahamas, Haiti, and Cuba.

N. O. Snow, Esq., of the firm, writes that he would prefer "a man who enjoys swimming, sailing, and deep-sea fishing, because it is frequently necessary for attorneys in the firm to meet with clients under these conditions." Because of the social demands placed upon the associates in this firm, the salary scale is relatively good. Beginning lawyers start at $5,200, and the firm forecasts generous increases. Because Mr. Snow is anxious to make a decision as soon as possible, interested students should leave their names at the Placement Office not later than five o'clock, Thursday afternoon, April 1.

We understand that three students applied for the job — beg pardon, the position.

* * *

We are indebted to an article in *Interchemical Review* by Francis A. E. Spitzer, head of the legal department of Interchemical Corporation, for the somewhat reassuring information that our Government is not the only producer of Gobbledygook or Bafflegab. He submits the following example from New Zealand:

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to the depth of the property that the contour is such as to preclude any reasonable development for active recreation.

Translation: "This piece of land is too steep for a playground."

* * *

The Detroit Lawyer tells the following story regarding a former Wayne County judge:

One day while hearing testimony in a divorce case, the old gentleman, who had a mischievous sense of humor and a sharp tongue, leaned over the witness as she finished her direct testimony and asked:

"What was the last thing your husband said to you before he left?"

The woman was obviously flustered and attempted not to answer. The judge pressed her, however, and finally she blurted out:

"Why, he told me to go to hell."

"And did you?"

"Well," retorted the now thoroughly bewildered witness, "I'm here."

* * *

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recently occurred at New Ulm, **Minnesota**, under the joint sponsorship of the Minnesota Editorial Association and the Committee on Public Relations of the Minnesota State Bar Association. Representatives of the two professions conducted a panel discussion which centered around the provisions of the ABA and MSBA Codes of Ethics prohibiting the publication of professional cards in newspapers.

The newspaper men contended that this is a blow to small newspapers and felt that the lawyers are doing the public a disservice if they do not tell the people through the newspapers where the lawyers are located. One of the lawyers explained that this matter had come up for consideration before the Ethics Committee of the ABA on many occasions and stated that the Committee felt that if it were to sanction the publication of professional cards it would get out of hand and result in wholesale solicitation of business through advertising.

The Bench and Bar of Minnesota reports that: "After a full discussion of the matter, action was taken to recommend at the next convention of the Bar Association that the insertion of professional cards in newspapers by lawyers be permitted."

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Compiled from the World Almanac and the L. A. Daily Journal of September and October 1929, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

The U. S. Senate is carrying on an investigation of lobbying. Testimony has been taken from many groups, including the pottery interests and the beet sugar industry. A committee of the American Bar Association charged in a report that a bureaucracy at Washington which "has a strangle hold on Congress, is the most immediate and insidious danger to our form of government."

* * *

In the presence of President and Mrs. **Hoover** and Mr. and Mrs. **Henry Ford, Thomas A. Edison,** at Dearborn, Michigan, reenacted his discovery of the electric light in the same laboratory in which he worked in Menlo Park, New Jersey, fifty years ago. Prof. **Albert Einstein** in Berlin and Commander Byrd in the Antarctic, radioed greetings to Edison's Golden Jubilee. As part of the celebration honoring Edison, the President, the Edisons and the Fords rode from the River Rouge Ford auto plant to Greenfield Village on a train of 3 cars drawn by "Sam Hill," an ancient steam engine. Edison played the role of "news butcher" on the train from which he had been tossed by an irate conductor in his youth. On this trip, the President was one of his customers; he bought a peach.

* * *

The Court of Louvain, Belgium, upheld New York architect **Whitney Warren's** demand that the inscription originally selected for the balustrade on the university should be placed thereon and ordered the substitute be replaced at the university's expense with Warren's inscription "Destroyed by German fury; restored by

American generosity." President Hoover, who served as chairman of the committee that raised 70% of the reconstruction fund, opposed the inscription.

* * *

Seventeen distilleries, 12 of them old plants of famous brands of whiskies, have been incorporated under Maryland law to make whiskey, wine and gin, "in so far as is now or hereafter may be, permitted by law."

* * *

Albert B. Fall, former Secretary of the Interior, has been convicted in the District of Columbia for accepting a bribe of $100,000 from **Edward L. Doheny** in the leasing of the Elk Hills naval oil reserve during the Harding Administration. Doheny testified for Fall, saying the money was simply a loan to an old friend. Fall was sentenced to a year in prison and given a $100,000 fine.

* * *

The Russian plane "Land of the Soviets" flew across Bering Strait from Kamchatka to Attu in the Aleutians, and then on to New York.

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Estate and Gift Tax Changes

ESTATE TAXES

The method of computing the estate tax has been simplified. This simplification has necessitated a change in the provision allowing credit for certain gift taxes.

A major revision of the relief in case of two taxes on the same property within a short period has taken place. Through Section 2013, a gradually disappearing credit is provided of 100% if the transferor died within 2 years of the present decedent; 80% if the transferor died within 2 to 4 years of the present decedent; 60% from 4 to 6 years; 40% from 6 to 8 years; 20% from 8 to 10 years; or none if the two deaths are more than 10 years apart. The former discrimination where the successive decedents were spouses has been eliminated to the extent that the marital deduction was not available. Section 2013.

A major field for new planning is introduced in Section 2042, which now exempts life insurance payable to named beneficiaries from federal death taxes if the decedent did not possess *any* incidents of ownership in the policy, irrespective of whether he may have paid some or all of the premiums thereon. It is expressly provided that a reversionary interest, by virtue of which the transferred policy might return to the decedent or his estate, is an incident of ownership if of a value in excess of five percent of the value of the policy immediately prior to death. This is true whether the reversion arose from the instrument of transfer or by operation of the law. Under the prior law, a reversionary interest was not considered to be an incident of ownership. Section 2042.

Caution is indicated in taking advantage of the estate planning possibilities of the new law to be sure that the insured has not only divested himself of all incidents of ownership, but that there is no substantial possibility that the policy may return to him or his estate.

Another change broadens the scope of the marital deduction to alleviate situations where property passed from one spouse to another in a form that made it taxable in the second estate, even though the interest did not technically qualify, under the rigid rules, for a marital deduction. In effect, a life estate in all or a part of

certain property, plus a broad power to dispose of the property at death, will qualify for the marital deduction. Section 2056.

The estate taxation of benefits passing to a survivor under an annuity or pension agreement has been specifically clarified. It is now provided that if the decedent at the time of his death had a right to receive annuity or comparable payments for life under a contract which was entered into after March 3, 1931, the value of any payments receivable by the survivor is included in the measure of the tax to the extent the decedent paid for the contract. The rule, however, does not apply to straight life insurance. Section 2039(a).

As to the question of who paid for the contract, any payments by an employer on behalf of the decedent are deemed to have been made by the latter unless pursuant to a qualified employee trust or annuity plan. If, on the other hand, the payment is pursuant to a qualified plan, only the decedent's contributions, if any, as an employee are treated as the decedent's cost. If the employee made no payments, no part of the contract would be taxable to his estate. Section 2039(b).

Another change provided in Section 2053 now allows an estate tax deduction for expenses of handling property even though it is not included in the probate estate, so long as the expenses are paid before the statute of limitations expires on the assessment of an estate tax deficiency. Similarly, debts of the decedent paid before the due date of the estate tax return are allowable even though they exceed in value the amount of the probate estate. Section 2053.

Section 2037, respecting the taxation of transfers in trust which are taxable in that they are to take effect at death, reverts to the pre-October 8, 1949 rule respecting transfers made on or after that time. Such a trust will be included in the decedent's estate only if he retained a reversionary interest in the property of a value in excess of five percent of the value of the property itself. This reversion, however, can include one arising by mere operation of law. Section 2037.

GIFT TAXES

The major change is to simplify the difficult problem of making a gift to a minor which would qualify for the annual exclusion of $3,000. This exclusion is not applicable to gifts of a future interest, a term defined quite broadly in the tax law. Under the new rule, a $3,000 exclusion will apply to any gift to a minor if the gift itself and any income from it may be expended on behalf of

the minor before he reaches age twenty-one, and any amount not spent during his minority will pass to him at twenty-one, or, if he predeceases that age, will pass to his estate or to whomever he may favor under a power of appointment. Section 2503(c).

It should be noted that current distribution of income to the minor, always a troublesome practical problem, is no longer required to qualify for the annual exclusion so long as the property cannot be taken away from the minor and the trustee has a discretionary power to use it for his benefit. On the other hand, however, it appears clear that discretionary power to distribute during minority must be given the trustee. One word of caution here. The gift tax changes will apply only to gifts made after the calendar year 1954. The old rules apply during the current year.

The new law also eliminates the old provision that a taxable gift occurred where a husband and wife bought property and took title as joint tenancy if the funds used were the husband's money. Formerly, a taxable gift occurred at that time. Under the new rule, no tax is created when the tenancy is originally set up, but a tax is due when it is terminated, other than by death, unless the property is divided in the same proportion as each party contributed to the purchase price. Thus, for example, if the husband buys the property with his own funds, takes it in joint tenancy with his wife, and later it is disposed of, with one-half the sales proceeds going to the wife, the taxable gift will then occur. An election is provided to treat the creation of the joint tenancy as a gift if the parties wish. Section 2515.

Another change will preclude the Treasury from revaluing prior year's gifts in a year which is not open for gift tax deficiencies for the purpose of throwing current year's gifts into a higher tax bracket. If the gift was made in a year which is closed by the statute of limitations, the value used in the tax return must now be accepted for the purposes of determining the current year's gift tax bracket. Section 2504(c).

A final change of significance is that the due date of gift tax returns has now been shifted to April 15 for 1955 and later years in line with the due date of income tax returns. Section 6075(b) and 6151.

Note that all gift tax changes become effective only with the calendar year 1955.

filing the petition as attorney for the guardian. By preparing the petition with knowledge that the guardian would sign and file the same in propria persona, without retaining or associating local counsel in State B, we think the California attorney would be doing by indirection what he would be prohibited from doing directly. We therefore conclude that while it would not be improper for the California attorney to render preliminary services to, or prepare a petition for, the California guardian where it is contemplated that the matter would be filed by and in the name of an attorney admitted in State B and subject to the latter's approval, as discussed above, it would be improper to do so where it is contemplated that the guardian would file the petition in propria persona.

If under the laws, local customs or rules of court of State B, an attorney admitted only in California would be permitted to file the desired pleading or to make the desired appearance in the particular proceeding or action without associating local counsel, then our opinion would, of course, be modified so as not to hold improper the action contemplated by subject inquiry.

This Opinion, like all Opinions of this Committee, is advisory only. (By-Laws, Art. X, Section 3)

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ABOUT FEDERAL RULE OF CIVIL PROCEDURE NO. 43B

(Continued from page 103)

courts have not expressly held that state law is applicable to the determination of that question, and they have not always clearly distinguished whether a witness could be called as an adverse witness or merely as a hostile witness, or whether such witnesses may be merely examined by the use of leading questions or also impeached.[11] Furthermore, in all but one of these cases federal jurisdiction was based solely on diversity of citizenship, so that state law applied to a greater degree than in cases arising under federal statutes, such as e.g. N.L.R.B. cases; on the other hand, if the question is a procedural question, which this presumably is, it is still not clear why these courts, even in diversity of citizenship cases, referred to state law.

There is one federal case, however, in which the court apparently recognized the inapplicability of state law to this problem, for it distinguished between the question who can be called as an adverse

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[11]Eckenrode v. Pennsylvania Railroad Co., 164 Fed. 2d 996 (C.C.A. 3, 1947), aff'd 335 U.S. 329, 69 Sup. Ct. 91, 93 L. Ed. 41. Holding: In action under Federal Employers Liability Act for death of a railroad man the trial judge was justified in the exercise of his discretion to allow the examination of the train crew by the plaintiff as hostile witnesses, and plaintiff was not bound by their testimony. The Circuit Court (Judge Goodrich) stated that neither the Circuit Court nor the defendant-appellee quarrelled with the exercise of the trial judge's discretion and he cited two Pennsylvania cases, but not the F.R.C.P., as authority. (The Supreme Court did not touch on this point; it merely affirmed the decision for the defendant.)

Shane v. Commercial Casualty Insurance Co., 48 Fed. Supp. 151 (D.C. Pa. 1942), affirmed without opinion 132 Fed. 2d 544. This was an injured person's attachment proceeding against an automobile liability insurance company. Held: Plaintiff was entitled to call the driver of the insured automobile as adverse witness and to examine him "as of cross-examination;" driver was an adverse witness within Pennsylvania statute, since he was adverse party in a suit out of which this action ensued. (Pennsylvania statute cited by court included among adverse witnesses, besides the categories contained in Rule 43(b), "any other person whose interest is adverse to the party calling him as a witness;" it is not quite clear whether it allows only interrogation by leading questions or also impeachment of such witnesses. See 28 P.S. Pa. Sec. 381.) Court did not cite F.R.C.P., but applied the reasoning of a Pennsylvania case (Digger v. Friedman, 279 Pa. 8, 123 Atl. 641, 643) which said: "In determining the character of the interest of a person called to testify, the substantialities of the situation, not mere technical reasoning, control."

Mitchell v. Swift, 151 Fed. 2d 770 (C.C.A. 5, 1945). In that case the court cited Texas law for the proposition that mere failure of a party's own witness to aid the party's case does not warrant his impeachment by that party. Apparently, Texas substantive law applied, as appears from court's rulings in other matters.

Moran v. Pittsburgh-Des Moines Steel Co., 166 Fed. 2d 908 (C.A. 3). In that case the court, reversing an unreported decision of the lower court, indicated that the defendant's officer was called as adverse witness by plaintiff under the Pennsylvania statute. The point whether such witness was called under the Pennsylvania statute or under the F.R.C.P. was not important, and the court's dictum therefore does not necessarily indicate that in federal cases state statutes can be resorted to in the calling of adverse witnesses. Upon retrial of the case (86 Fed. Supp. 255) the lower court again permitted cross-examination of defendant's officer by plaintiff without, however, stating whether it did so under the Pennsylvania statute or under Rule 43(b); however, the court did say that it permitted the witness' cross-examination by defendant under Rule 43(b). The Circuit Court, in again reversing the lower court's judgment (183 Fed. 2d 467), this time said in passing that defendant's officer was called as an adverse witness by plaintiff under Rule 43(b).

witness and the question what evidence can be used for impeachment, holding that the former is governed by Rule 43(b) whereas the latter, falling under Rule 43(a), may be governed by the state rule.[12]

Turning now to the category of "hostile or unwilling" witnesses, the question arises, "What foundation must be laid to establish a witness as hostile or unwilling?" Generally, the answer is that actual manifestation of hostility or unwillingness by the witness is not a prerequisite. Of course, there are many cases on the books in which a party was given permission to interrogate a witness by leading questions after such witness had shown actual hostility or unwillingness.[13] But I have found only one federal case in which denial of such permission was based on an absence of such showing.[14] In most other cases, if the position of the witness was such that his interests were adverse to that of the party calling him, the courts *presumed* hostility or unwillingness and permitted the use of leading questions, if not more. Thus, in a criminal case, the prosecution was allowed to call the business associate of the defendant as a hostile witness;[15] in a case arising out of an automobile accident which involved three

[12]Mosson v. Liberty Fast Freight Co., 124 Fed. 2d 448 (C.C.A. 2, 1942). This was an action for the death of decedent in an automobile collision with defendant's truck. Defendant called a witness who had seen the collision and whose testimony tended to exonerate the defendant's driver and put the fault on the driver of decedent's car. Plaintiff, on cross-examination, introduced a prior written statement by the witness, varying from the witness' testimony on direct examination. Also, the witness, on cross-examination, stated that he saw no trailer in front of decedent's car. On rebuttal defendant produced the testimony of a police officer that the witness had told the officer at the scene of the accident, that decedent's car had made a sudden turn to the left from behind a trailer which obscured it from defendant's on-coming truck. The officer's testimony was admitted over plaintiff's objection. The appellate court held the admission of this testimony error (1) under Rule 43(b) because the witness "was not a party;" (2) under Rule 43(a) because New York law allows the impeachment of one's own witness only by a signed or sworn statement; (3) because the officer's testimony was incompetent to rehabilitate the witness' testimony on direct, since rehabilitation is permitted only where a witness is "impeached because of a motive to falsify and a declaration had been made before the motive had arisen," which was not the case here. Thus, the court held in effect: Where one's own witness is sought to be impeached, two principles apply: first, whether the witness is an adverse witness and thus may be impeached by the party calling him absent surprise, etc., is to be decided under Rule 43(b); second, the admissibility of the impeaching evidence is governed by Rule 43(a), *i. e.*, by state law or federal law whichever is more liberal. But note: court was not quite consistent; it ruled out the evidence under state law without exploring whether it would have been admissible under federal case law.

[13]E.g. Lewis v. U. S., 153 Fed. 2d 724; U. S. v. Goldstein, 153 Fed. 2d 359.

[14]Kamosky v. Owens-Illinois Glass Co., 89 Fed. Supp. 561 (D.C. Pa., 1950), aff'd without discussion of this point 185 Fed. 2d 674 (C.A. 3). This was a damage suit for injury due to an explosion of a glass bottle manufactured by defendant and filled by a brewery which was made third party defendant. Plaintiff called the supervisor of the bottle washing department of the brewery as plaintiff's witness (not as adverse witness). The witness answered fully and frankly. Plaintiff asked a question which was objected to as leading. Plaintiff then asked to call the witness "for cross-examination." Court refused on ground that witness was not an officer, director or managing agent of a corporate adverse party nor unwilling or hostile as required by Rule 43(b). In denying motion for new trial court said that, even if plaintiff had been permitted to treat the witness as an unwilling or hostile witness, he could not have obtained more extensive testimony than he did get and that plaintiff therefore was "not harmed by the court's ruling." But court did not state in so many words whether the ruling was correct or harmless error.

[15]Fields v. U.S., 164 Fed. 2d 97 (C.A. D.C., 1947), cert. den. 332 U.S. 851, 68 Sup. Ct. 355, 92 L. Ed. 421, reh'g den. 333 U.S. 839, 68 Sup. Ct. 607, 92 L. Ed. 1123.

vehicles, the plaintiff was allowed to call the driver of one of the vehicles as a hostile witness, since the latter had been a defendant in a previous action arising out of the same accident and had been dismissed as a defendant in the instant action;[16] in an income tax evasion case the government was allowed to call the confidential employee of defendant and defendant's brother as hostile witnesses.[17]

Also, it appears to be the rule that, where a corporation, partnership, or other association is sued for certain conduct, the official who is alleged to have committed that conduct on the part of the defendant corporation, partnership, or association, may be called as a hostile witness without the laying of any further foundation. Thus, in a case having arisen before the National Labor Relations Board, the reviewing Circuit Court stated that it was not error to allow the attorney for the Board to cross-examine employers or supervisory employees who were charged with unfair labor practices even though the Board had called them.[18] Through analogous rulings the following classes of persons were permitted to be called as hostile witnesses, apparently merely on the basis of the position that they occupied in relation to the proceedings: a train crew in an action under the Federal Employers Liability Act against a railroad for the death of a railroad man;[19] the president of a co-respondent in an unfair labor practice case (under Rule 43(b) he could also have been called as an adverse, not only a hostile, witness);[20] in a slander case against a corporation, the official of the corporation who was alleged to have uttered the slanderous remarks;[21] in a suit against the operator of a harbor tug boat to recover damages for the death of a seaman by drowning, the plaintiff who was required to rely on the tug master for substantially

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Although the Federal Rules of Criminal Procedure contain no Rule similar to Civil Rule 43(b), the courts apply a similar rule in criminal cases in regard to hostile or recalcitrant witnesses. See e.g. DiCarlo v. U.S., 6 Fed. 2d 364 (C.C.A. 2, 1925) and Harman v. U.S., 199 Fed. 2d 34 (C.A. 4, 1952).

[16]U.S. v. Uarte, 175 Fed. 2d 110 (C.A. 9, 1949). In this case the court stated expressly that the driver was called as an adverse witness on the presumption that the driver would be unwilling. The court also stated, that, even in absence of Rule 43(b), it was not error to permit plaintiff to refresh the driver's memory by a prior statement; however, the court did not state that impeachment by a prior statement would have been proper.

[17]Garieppi v. U.S., 189 Fed. 2d 459 (C.A. 6, 1951). In this case the court also stated that "it was to be expected that they would not testify willingly," without mentioning any instances or evidence of actual hostility or unwillingness on the part of the witnesses.

[18]N.L.R.B. v. Garfunkel, 162 Fed. 2d 256 (C.C.A. 2, 1947). The court referred specifically to Rule 43(b).

[19]Eckenrode v. Pennsylvania Railroad Company, supra, footnote 11.

[20]N.L.R.B. v. Condenser Corp. of America, 128 Fed. 2d 67 (C.C.A. 3, 1942).

[21]Watson v. Cannon Shoe Co., 165 Fed. 2d 311 (C.C.A. 5). The official was the district manager for a certain territory, and apparently not an officer or director. Court did not indicate whether it considered him a "managing agent."

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all of her evidence was held to be entitled to cross-examine him as a hostile witness;[22] and in an action involving breach of contract for the sale of cattle the defendant tried to call the corporate plaintiff's head livestock buyer, whereupon the trial court, upon objection, held that the witness could not be called as adverse witness but that he, as a hostile witness, may be asked leading questions.[23]

It has also been held that where the prosecution is "under a legal duty or obligation" to call a witness in a criminal case, such as an available witness to the crime, it may impeach the witness.[24] The same rule has been extended to civil cases, e.g. in relation to attesting or subscribing witnesses to a deed or will.[25] The reason for these holdings is that a party who is compelled to call a witness cannot be said to vouch for that witness' credibility.

Furthermore, there is one case in which the appellate court said, without giving any details as to the identity, position or behavior of the witness involved and without referring to Rule 43(b), that permitting the plaintiff to cross-examine as hostile the witness whom the plaintiff had called was discretionary with the trial court.[26]

There remains the question whether hostile or unwilling witnesses, as distinguished from adverse witnesses, may be impeached. Rule 43(b) states merely that such witnesses may be interrogated by leading questions, whereas it permits adverse witnesses to be impeached and contradicted in addition to being interrogated by leading questions. It will be seen that Rule 43(b) does not expressly allow hostile or unwilling witnesses even to be contradicted, although that certainly is the rule even as to friendly and willing witnesses, since otherwise any party would be bound by the first unfavorable or incorrect statement of any of its witnesses.[27] Can it be concluded that, because Rule 43(b) allows the contradiction and impeachment of adverse witnesses only but not of hostile witnesses, but the contradiction of hostile witnesses is in fact permitted as a matter of general law, the impeachment of hostile witnesses is also permitted?

Not many courts have decided this question. There are some criminal cases which, although not governed by the F.R.C.P., are

[22]Di Nicola v. Pennsylvania Railroad Company, 158 Fed. 2d 856 (C.C.A. 2, 1946). Court cited Rule 43(b).
[23]Ruud v. American Packing and Provision Co., 177 Fed. 2d 538 (C.C.A. 9, 1949).
[24]Meeks v. U.S., 179 Fed. 2d 319 (C.A. 9, 1950).
[25]58 Am. Jur., Witnesses, Sec. 795, and cases there cited.
[26]Knott Corp. v. Furman, 163 Fed. 2d 199 (C.C.A. 4, 1947); cert. den. 332 U.S. 809, 68 Sup. Ct. 111, 92 L. Ed. 387, reh'g den. 332 U.S. 826, 68 Sup. Ct. 164, 92 L. Ed. 401.
[27]58 Am. Jur., Witnesses, Sec. 797.

WHEN TEDDY ROOSEVELT'S WHITE FLEET CAME TO SOUTHERN CALIFORNIA...

On April 18, 1908, President Theodore Roosevelt's "White Messengers of Peace"—a white-painted fleet including 16 battleships—dropped anchor at Santa Monica, Redondo, San Pedro and Long Beach on a round-the-world tour. In that year this Bank had been conducting a Trust Service for Southern Californians for half a decade.

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closely enough related to this question to shed some light thereon.[28] The few civil cases touching on this question indicate generally a negative answer thereto. The general rule on this subject is that *any* witness may be impeached through his prior inconsistent statements by the party who called him, if he surprises that party by not only failing to repeat previously made favorable statements but by also giving affirmatively detrimental evidence, i.e. evidence on which an adverse finding can be based.[29] Consequently, it has been held that the mere failure of a party's witness to aid the party's case without, however, "disprov[ing] in some degree, the case of the party by whom [he] is called," does not warrant his impeachment by that party.[30] And in one case the court held that the head livestock buyer of the adverse party could not be called as an adverse witness, and it refused to reverse the trial court in sustaining an objection to that witness' impeachment, saying that the trial court's holding "could not possibly have been prejudicial to the defendant," but not stating unequivocally whether such holding had been correct or harmless error.[31] In another case the court, by way of dictum, stated that, although a plaintiff "was compelled to call as his witness" the defendant railroad's engineer through whose alleged negligence the plaintiff was injured, he "could not directly impeach him [but] he was not necessarily bound by his testimony. He could have offered testimony to contradict him." The court did not refer to Rule 43(b), nor did it refer to the engineer as either an "adverse," "hostile" or "unwilling" witness.[32] In yet another case the court stated, also by way of dictum, that a party who calls a witness, anticipating adverse testimony from that witness, cannot plead surprise and treat the witness as adverse; the actual holding in that

[28]In Meeks v. U.S., supra, footnote 24, the court permitted the impeachment of a witness whom the prosecution was "under a legal duty or obligation" to call. In Pastrano v. U.S., 127 Fed. 2d 43 (C.C.A. 4, 1942), and Zimberg v. U.S., 142 Fed. 2d 132 (C.C.A. 1, 1944), cert. den. 323 U.S. 712, 65 Sup. Ct. 38, 89 L. Ed. 57, the courts did not actually use the word "impeachment," but held that it was not an abuse of discretion for the trial court to permit the prosecution to confront its own witnesses with their prior inconsistent statements and to question them thereon. However, while the witnesses, apparently in both cases, surprised the prosecution by refusing to repeat previously made statements which were favorable to the prosecution, only the witness in the Pastrano case supplied evidence which was affirmatively detrimental to the prosecution in the sense of being capable to support by itself an adverse finding. And while the appellate court in the Pastrano case based its holding on the fact that there was "surprise . . . by adverse testimony," the appellate court in the Zimberg case based its holding on "the witness' hostility."

[29]See e.g. Sullivan v. U.S., 28 Fed. 2d 147 (C.C.A. 9, 1928); Ellis v. U.S., 138 Fed. 2d 612 (C.C.A. 8, 1943) and cases cited therein. While these are criminal cases, the courts laid down the general rule without confining it to criminal cases. See also Bassett v. Crisp, 113 Cal. App. 2d 295, 248 Pac. 2d 171; Martin v. Los Angeles Ry. Corp., ... Cal. App. ....., 171 Pac. 2d 511; Wigmore on Evidence, 3rd Ed., Sec. 904(3); and cases cited therein.

[30]Mitchell v. Swift, supra, footnote 11.

[31]Ruud v. American Packing and Provision Co., supra, footnote 23.

[32]Zumwalt v. Gardner, 160 Fed. 2d 298 (C.C.A. 8, 1947).

case, however, was only that a prior statement with which that party had confronted the witness could not be used as substantive evidence.[33]

On the question whether a witness, called by one party as an adverse witness, may be impeached and contradicted *by the other party* (i.e. in effect by his own counsel), Rule 43(b) is quite specific, and the answer is yes. It would seem that the answer is the same with respect to hostile or unwilling witnesses, although Rule 43(b) does not expressly so provide and I have found no cases on this point; however, since this is true both as to ordinary and as to adverse witnesses, there is no reason why it should be different as to hostile witnesses, who are in fact an intermediate category.

Rule 43(b) is also silent on the question whether witnesses, called by one party as adverse or hostile witnesses, may be interrogated by the use of leading questions by the other party (i.e., again, in effect by their own counsel). And there appear to be hardly any cases dealing with this question: I have found only one case on this point, and that case held that it may be done; however, that case involved a hostile witness only, and the court did not indicate whether it would have held likewise in the case of an adverse witness.[34]

In conclusion, it should be mentioned that resort to Rule 43(b) is a definite right and is not subject to the discretion of the judge. Furthermore, the scope of the direct examination of a hostile or adverse witness by the calling party is in no way restricted by Rule 43(b), and it appears therefore that such examination may cover any material and relevant matter, and not, for instance, solely evidence which is not otherwise available. Finally, there is no indication in Rule 43(b) of any restriction on the number of witnesses who may be called under that Rule, provided, of course, that they meet the qualifications set down in the Rule itself.

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[33]U.S. v. Diener, 52 Fed. Supp. 54 (D.C. Pa., 1943). In this case, a Mann Act prosecution, the woman involved gave FBI agent a statement, admitting to have engaged in prostitution at behest and for benefit of defendant. She then notified prosecution that her statement was incorrect and that she would testify to the contrary. Court, after pronouncing dictum stated above, ruled that woman's prior statement was admitted by trial court not as affirmative proof but for purposes of impeachment and that without that prior statement there was no proof of defendant's guilt.

[34]Arnette v. U.S., 158 Fed. 2d 11 (C.C.A. 4, 1946). This was a criminal case in which an accomplice of defendant was called as the state's witness and in which the prosecution objected to defendant's counsel asking leading questions on cross-examination of that witness. Held: that witness is favorable to side of cross-examiner is no ground for excluding leading questions on cross-examination. No authority cited. As to the general law on this subject, Corpus Juris (Witnesses Sec. 691) states that "where a party is called as a witness by his adversary, the court in its discretion may permit, or refuse to permit, leading questions to be put to him by his own counsel." Wigmore on Evidence (3rd Ed., Secs. 773 and 774), although not covering specifically this exact question, seems to be in accord with the statement in Corpus Juris.